UNITED STATES AND THE CRIMINAL INTERNATIONAL COURT: A KANTIAN VIEW

This essay wants to analyse the relations between the United States and the International Criminal Court (ICC) by adopting a Kantian point of view. Specifically, we will consider the "Perpetual peace", a work of Immanuel Kant written in 1795.

As known, the ICC was officially established in 2002, but the Rome Statute, i.e. its own statute, was drafted back in 1998.[1] Its purpose is to prosecute individuals for the international crimes of genocide, as it is described in the second article of the Convention on the prevention and punishment of the crime of genocide[2], against humanity and war crimes. Nowadays, the ICC includes 123 Member states, but it does not include United States. In fact, Americans had their role in the international negotiation and they even signed the Statute, but the Congress has never ratified it.

It was the Clinton administration to require, for the first time, the exemption of the US military from the jurisdiction of the court.[3] In the last decade, the US have taken

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[1] For the original text of the Rome Statute, see: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[2] In the second article of the Convention of 1948, it is established that acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group", such as: "(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group" are considered as genocide.

[3] John P. Cerone, «Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals», *The European Journal of International Law*, vol. 18, no. 2, 2007, pp. 277-315.

a series of measures to limit the jurisdiction of the ICC on American citizens.

First of all, US signed numerous treaties with other states, including Member states of the ICC, in which is established that US citizens are exempted from the competence of the Criminal Court in case they are suspected of having committed an international crime. [4] These "*exemption agreements*" are 102, according to the US State Department. In Africa, 16 out of 38 signed agreements are currently valid: 10 with Member states of the ICC (Botswana, Cameroon, Comoros, Gambia, Ghana, Malawi, Nigeria, Democratic Republic of Congo, Sierra Leone and Uganda). In the American continent, there are at the moment 6 valid agreement, of which 5 with Member states (Antigua and Barbuda, Colombia, Guyana, Honduras and Panama). In Asia, unless were signed 16 agreements, only 7 are now in force: among these, Afghanistan, Cambodia and Timor East are agreements with ICC Member states. Finally, in Europe there are 6 operating agreements, of which 4 with Member states (Albania, Bosnia-Herzegovina, Macedonia and Tajikistan).[5]

Moreover, US President in 2002, George W. Bush, signed a federal law known as "ASPA", which stands for "American Service-Members' Protection Act", in order "to protect United States military personnel and other elected and appointed officials of the United States government against criminal prosecution by an international criminal court to which the United States is not part". This law is also

[4] Markus Benzing, «US bilateral non-surrender agreements and article 98 of the Statute of the International Criminal Court: an exercise in the law of treaties», *Max Planck Yearbook of United Nations Law Online*, vol. 8, issue 1, 2004, pp. 181-236.

[5] Ornella Ferrajolo, *Corte penale internazionale: aspetti di giurisdizione e funzionamento nella prassi iniziale*, Giuffrè Editore, Milan, 2007, pp. 157-165.

known as "*The Hague Invasion Act*", in reference to the seat of the ICC in Netherlands.

Acting this way, US wants to maintain a special *status* in the international society. US leverages on its international role: while the European Union, Japan or other countries live in a Kantian paradise, where the military force has been abolished and the main items of foreign policy are co-operation and transnational ties, US continues to live in the anarchical and hobbesian world of "war of all against all".[6]

In a state of nature such as the international society, where there is not a superior authority, laws and justice may not be the right way. As Robert Cooper states:

> Among ourselves [The liberal-democratic states of the West], we operate on the basis of laws and open co-operative security. But when dealing with more old-fashioned kinds of states [...] we need to revert to the rougher methods of an earlier era – force, pre-emptive attack, deception, whatever is necessary to deal with those who still live in the nineteenth century world of every state for itself. Among ourselves, we keep the law, but when we are operating in the jungle, we must also use the laws of the jungle.[7]

In the US point of view, the jurisdiction of the ICC represents an obstacle for its foreign policy. For the European allies, on the contrary, this US attitude poses a danger. The American unilateralism, based on "the pre-eminence in every domain of power – economic, military, diplomatic, ideological,

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[6] Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order*, Alfred A. Knopf, New York, 2003, pp. 59-77.

[7] Robert Cooper, «The New Liberal Imperialism», *The Observer*, 7th April 2002, http://attacberlin.de/fileadmin/Sommerakademie/Cooper_New_liberal_Imperialism.pdf.

technological and cultural", classified the US as a "rogue superpower" in the eyes of the Europeans.[8]

THE FREEDOM OF THE SAVAGES: THE US ACCORDING TO KANT

The US are not willing to bow down to the international institution when its national interest are in danger. This attitude was proven during the invasion of Iraq in 2003. The mere suspicion that Saddam Hussein holding the exposures weapons of mass destruction has prompted the Americans to intervene. As written by John Ikenberry:

> The use of the force, this camp argues, will therefore need to be pre-emptive and perhaps even preventive – taking on potential threats before they can present a major problem. But this premise plays havoc with the old international rules of self-defence and United Nations norms about the proper use of force […] Even without a clear threat, the United States now claims a right to use pre-emptive or preventive military force.[9]

In a nutshell, US does not put itself under a shared set of laws. This bring us to the political theory of Immanuel Kant.

Exempting itself from the ICC jurisdiction and circumventing the Charter of the United Nations make the US an "outlaw" state. In his "Perpetual peace", Kant explain that peace is not a given. To create a state of peace, states have to renounce to part of their sovereignty, that will be conferred to a superior and supranational authority. The main problem of an "international state of nature", as a "domestic" one, is that there is no independent judge. Everyone can simply take justice on its own. Obviously, in such a condition, revenges and blood feuds

[8] Samuel Huntington, «The Lonely Superpower», *Foreign affairs*, vol. 78, no. 2 (March-April 1999), pp. 35-49.
[9] John Gilford Ikenberry, «America's Imperial Ambition», *Foreign Affairs*, vol. 81, no. 5 (September-October 2002), pp. 44-60.

are daily events. This is, in Kant's words, the "freedom of the savages".[10]

Once the individuals have built the state to escape the state of nature and to institute an autonomous judge among themselves, the so-called "Hobbes's Dilemma" shows up.[11] Conferring the power of all individuals to one sovereign makes the latter an individual above law and justice. The state follow the medieval maxim "*superiorem non recognoscens*". Among states, therefore, there is not a shared set of laws or an independent judge, but only several independent states claiming their sovereignty. The "international state of nature" is the consequence of the end of the "domestic state of nature".

In this scenario, the only solution for Kant is the "federalism of free states", on which a new international order can be founded. This can be difficult to achieve, because:

> Each state places its own majesty (because the majesty of the people is a senseless expression) exactly in not be subject to any external legal coercion and the luster of his sovereign is that, without he putting himself in danger, many thousands are under his command, to sacrifice themselves for something that they do not care at all.[12]

We consider the savages without a state as a underdeveloped community, but we do not understand that in the international society, nations as the United States act exactly as those savages. Thinking like the Americans means to heed to traditional international law, the one of Hugo Grotius, Pufendorf and Emerich de Vattel, the "nagging comforters" vilified by Kant.[13]

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[10] Immanuel Kant, *Zum ewigen Frieden*, AK VIII 354.

[11] Robert Owen Keohane, «Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society», in Robert Owen Keohane, *Power and Governance in a Partially Globalized World*, Routledge, New York/London, 2002, pp. 63-87

[12] Kant, *ZeF*, AK VIII 354.

[13] Kant use an expression of the Bible (Job, 16.2). In particular, Kant makes reference to the version translated in German by Luther ("*Ich habe vieles dergleichen gehört; leidige Tröster seid ihr alle!*»). In brief, Job's friends

This kind of international law wants to keep valid the paradigm of "*superiorem non recognoscens*" and, at the same time, to offer a righteous way to settle down the conflicts between states. This, for Kant, is impossible. The only way to apply the law in such a contest is to wage war. In Bobbio's work "Il problema della guerra e le vie della pace" ("The problem of the war and the ways of peace"), the author says that the outcome of the war is opposite to one of an usual process. As a matter of fact, the first one ends up to "give reason to the winner".[14]

United States, keeping outside from the ICC jurisdiction and violating the provisions of article 51 of the UN Charter, seems like real savages.

WHAT TO DO?

The United States should not give up their role as hegemon. Their military, economic and technological supremacy allows them to remain so. Moreover, the benefits for allied states are varied: US rewards countries that follow its leadership with "access to the American market, foreign aid, military assistance, exemption from sanctions, silence about deviations from US norms […]".[15]

The way to go is the one suggested by Ikenberry. The United States must recover what Ikenberry calls "the old strategic orientation". In short, it must balance the realist military foreign policy and the liberal multilateralism one. To do so, the United States must change its attitude towards the international institutions. In fact, the secret of the United States' success during the Cold war among the allied states was "its ability and

tried to unfold the plights of the prophet by giving an *ad hoc* explanation, i.e. they derived right from facts.

[14] Norberto Bobbio, *Il problema della guerra e le vie della pace*, Società editrice Il Mulino, Bologne, 1979, pp. 97-101.

[15] Huntington, «The Lonely Superpower», p. 41.

willingness to exercise power within alliance and multinational frameworks".[16]

In addition, the American "fight against terror" needs the co-operation of the allied states. A military intervention agreed within the international bodies implies, for sure, a minor cost compared to a unilaterally decided invasion. Sanctions also are more likely to have succeed if allied states participate to them, too.

Continue to play the role of the "outlaw" state that escapes the jurisdiction of an important international body such as the International Criminal Court, will lead to undermine the others international institutions. Moreover, US are losing their ability to attract the allied states, which are increasingly on the side of international law, rather on the American partners' one.

[16] Ikenberry, «America's Imperial Ambition», p. 56.